STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
(Murray P.J., Gage & Kelly JJ.)

JOSEPH and THEODORA STAMPLIS,

Plaintiff-Appellees,

vs.

ST JOHN HEALTH SYSTEM, d/b/a RIVER DISTRICT HOSPITAL,

Defendant-Appellant,

and

G. PHILLIP DOUGLASS, D.O., jointly and severally, HENRY FORD HEALTH SYSTEMS, d/b/a HENRY FORD HOSPITAL,

Defendants. /

Supreme Court
No. 126980

Court Of Appeals
No: 241801

St. Clair County Circuit Court
No: K01-1051-NH

REPLY BRIEF FOR DEFENDANT-APPELLANT RIVER DISTRICT HOSPITAL

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ARGUMENT

I. THE STIPULATED ORDER OF DISMISSAL WITH PREJUDICE OF DR. DOUGLASS OPERATED AS RES JUDICATA SO AS TO BAR THE VICARIOUS LIABILITY CLAIM AGAINST RIVER DISTRICT HOSPITAL; THE EFFECT OF AMENDMENT TO THE CONTRIBUTION STATUTE ON THE DISTINCT DEFENSE OF CONTRACTUAL RELEASE IS NOT DETERMINATIVE.

Plaintiffs begin with an entirely incomplete, and thus inaccurate, characterization of defendants' argument as: "Defendants assert that *Theophelis v Lansing Gen Hosp*, 430 Mich 473 (1987), requires this Court to affirm the trial court because *Theophelis*, construed MCL 600.2925d to continue the common law rule that a 'valid release of an agent for tortious conduct operates to bar recovery against the principal on a theory of vicarious liability.'" (Plaintiffs' brief, p 17). It is only in response to the specific briefing directive of this Court, that River District Hospital indeed has submitted that *Theophelis* remains good law, and that common law release law principles could provide an alternative basis for affirmance.[1]

However, the effect of a contractual release was not the basis upon which River District Hospital sought, nor upon which the trial court granted summary disposition, and thus this Court need not foray into the intricacies of *Theophelis* or the contribution statute amendment. Defendant River District Hospital's argument was, and is, that summary disposition was proper based on the res judicata effect of the order of dismissal of Dr. Douglass with prejudice. In moving for summary disposition, counsel for the Hospital submitted that:

> [By counsel for River District Hospital:] [Michigan cases] have recognized that a voluntary stipulation and order for dismissal has the effect of res judicata. That is, it is just as good as a decision on the merits. That being the case, we move for dismissal of the hospital as the dismissal of Doctor Douglass with prejudice leaves no issue remaining as to the hospital. * * *

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[1] See *Larkin v Otsego Memorial Hospital Ass'n*, Mich App 391, 399; 525 NW32d 475 (1994) in which Judge, now Chief Justice Taylor in dissent analyzed the issue under both release and res judicata principles

> We believe we're entitled to a Summary Disposition of the Plaintiff's claim against us as the sole claim that exists against River District Hospital as the claim of vicarious liability for the actions or omissions of Doctor Douglass. Dr. Douglass has been dismissed voluntarily by the Plaintiff with prejudice. And that acts as res judicata [Tr II, pp 8-10, Apx 64a-65a]

Res judicata created by a stipulated order of dismissal with prejudice, not the effect of a contractual release, was the basis upon which the trial court granted summary disposition:

> [The Court:] The decision to dismiss Doctor Douglass with prejudice is res judicata as to any claim for vicarious liability against River District Hospital.* * *
>
> Plaintiff's counsel repeatedly acknowledged that the dismissal was to be with prejudice. Nowhere did River District Hospital agree to waive its legal defense of res judicata. [Tr II, pp 35, 36 Apx 90a, 91a]

Indeed, "release" and res judicata ("prior judgment") are separate and distinct defenses under MCR 2.116(C)(7). Only the latter was at issue here. As defense counsel noted before the trial court, "[T]his is not a release or covenant where there was an actual stipulation between the parties on a contract." (Apx, p 72a, Tr II, p 17).

The amendment to the contribution statute, MCL 600.2925d, is ultimately irrelevant as it is directed to the effect of a "release or a covenant not to sue or not to enforce judgment"--purely contractual issues. Plaintiffs' belated yet elaborate attempt to divert this Court's attention from the determinative defense of res judicata, and to fashion this appeal into something far more complex involving the contribution statute, MCL 600.2925d, must be rejected. (As set forth in defendant's principal brief, however, should the Court need to reach the release/contribution statute issue, defendant does submit that this can serve as an alternate, albeit not necessary, justification for the decision below).

Significantly, plaintiffs offer little of substance with respect to principal issue of res judicata. Plaintiffs do not directly challenge the correctness of the principle of Michigan law that an order of dismissal with prejudice of an agent has res judicata effect as to vicarious liability

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claims against the principal. Plaintiffs appear to argue only that an exception should be made in this case given the policy underlying the doctrine of res judicata noted in *Hackley v Hackley*, 426 Mich 582; 395 NW2d 906 (1986) and *Pierson Sand And Gravel v Keeler Brass Co*, 460 Mich 372; 596 NW2d 153 (1999). (Plaintiffs' merit brief, pp 24, 40-41). However, this is not a "special case" that would warrant creating an exception to the operation of res judicata under the analysis *Hackley* and *Pierson Sand.* Both turned on whether the claim sought to be advanced could or could not have been litigated as part of the initial claim. Here there is but one claim arising out of the conduct of Dr. Douglass. The policy concerns in *Hackley* and *Pierson Sand* are inapplicable--this is a straightforward order of dismissal with prejudice that under Michigan common law, basic dictionary definitions, and MCR 2.504, operates as an adjudication on the merits and as res judicata.

Most of the cases from other jurisdictions cited by plaintiffs (brief, pp 20-23), deal with the distinct (and nondeterminative) issue of the effect of a contractual release. Moreover, *Woodrum v Johnson*, 210 W Va 762, 559 S.E.2d 908 (2001), and *Pelo v Franklin College*, 715 NE2d 365 (Ind 1999), would be of no assistance even on the question of the effect of a release. Both involved a written release agreement which, unlike the stipulation here, specifically and expressly reserved the right to proceed on a vicarious liability claim against the principal; based on this, the courts held the release did not release principal.

Only one case cited by plaintiffs addresses an issue of the res judicata effect of a dismissal with prejudice. In *JFK Medical Center, Inc v Price*, 647 So2d 833 (Fla 1994), the court held that a voluntary dismissal with prejudice of an agent was not an adjudication on the merits and therefore did not operate as res judicata as to the principal under Florida law. However, this determination under Florida law is inconsistent with Michigan law which, like that

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of the Federal Courts, see *Nemaizer v Baker*, 793 F2d 58, 61 (CA 2, 1986), *Astron Industrial Association, Inc v Chrysler Motors Corp*, 405 F2d 958 (CA 5, 1968), is that a dismissal "with prejudice" operates as an adjudication of the merits with res judicata effect, regardless of whether the dismissal with prejudice was based on a dispositive motion or trial, or is voluntary or is involuntary. Once a consent judgment has been entered, it has the full force and effect of a litigated judgment; consent judgments are not to be treated as mere contracts, but, to the contrary, as adverse judgments. See *Trendell v Solomon*, 178 Mich App 365, 367; 443 NW2d 509 (1989), and authorities cited in defendant's principal brief.

Further, the application of res judicata to a consent judgment or voluntary dismissal with prejudice is required as a logical corollary of the broad, rather than narrow, application of res judicata endorsed by this Court. That is, in Michigan, res judicata applies to points not only decided by the court but to every point which properly belonged to the subject of the litigation. *Hackly, supra*, 585. Under this broad application, what is or is not actually decided by a trial court in entering a dismissal with prejudice does not determine the scope of the res judicata effect of the order. Thus, whether an order of dismissal with prejudice is by consent of the parties, or is involuntary due to misconduct, or is by a determination of the claim on the merits by the trial court or jury, is of no significance. Where a party has commenced an action and then seeks to voluntarily dismiss it with prejudice, res judicata must apply "to every point which properly belonged to the subject of the litigation," *Hackly, supra*, 585, regardless of what points, if any, were actually decided on their merits by the trial court.

II NEITHER FRAUD NOR MISTAKE NOR EXTRAORDINARY CIRCUMSTANCES WERE SO CLEARLY ESTABLISHED AS TO RENDER THE TRIAL COURT'S EXERCISE OF DISCRETION IN DENYING RELIEF FROM JUDGMENT UNDER MCR 2.612(C) AN ABUSE OF DISCRETION.

Plaintiffs concede that the general rule is that a mistake of law rather than of fact is not

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grounds to set aside a contract, or similarly a judgment under MCR 2.612. See *Schmalzriedt v Titsworth*, 305 Mich 109, 119; 9 NW2d 24 (1943) ("'Mistake as to the legal effect of a written instrument, deliberately executed and adopted, constitutes no ground for relief in equity.") Plaintiffs' further assertion that the trial court "ignored" and should have applied "exceptions" to this rule is without merit.

While plaintiffs quote language from or cite to principles set forth in many Michigan appellate decisions acknowledging both the rule regarding mistake and exceptions thereto, in virtually every case the appellate court affirmed the trial court's discretionary determination in the first instance as to whether an exception should be allowed. See e.g. *Carpenter v Detroit Forging Co*, 191 Mich 45 (1916) (affirming decision of Accident Board setting aside release induced by adjuster's misrepresentation of law to unrepresented claimant), *Komraus Plumbing & Heating, Inc v Cadillac Sands Motel, Inc*, 91 Mich. 1; 51 NW 692 (1972) (reversing Court of Appeals and reinstating trial court decision refusing to set aside a contract for fraud or mistake), *Stone v Stone*, 319 Mich 194; 29 NW2d 271 (1945)(affirming trial court decision to set aside transfer of partnership made for tax purposes where subsequent Supreme Court decision eliminated tax benefit), *DeHaan v DeHaan*, 348 Mich 199; 82 NW2d 432 (1957) (affirming trial court decision setting aside divorce because the wife concealed the fact that she was pregnant by another man), *Valentino v Oakland County Sheriff*, 134 Mich App 197; 351 NW2d 271 (1984) (affirming trial court decision to make findings contrary to stipulations of fact where there was fraud upon the court in that defense counsel falsely represented that defendant had no knowledge of the pertinent facts). These decision affirming provide no basis upon which to urge reversal of the trial court's exercise of discretion.

Renard v Clink, 91 Mich 1 (1892), also cited by plaintiffs, in completely inapposite as it

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dealt not with setting aside a judgment or contract, but with whether equity would be applied to excuse a mortgagee assignee's refusal of a tender of the amount due on the mortgage by the mortgager that otherwise would discharge the lien.

None of the decisions cited by plaintiffs involves, as does this, a mistake of law by legal counsel in an adversarial setting. Indeed, the federal courts have held that just such a mistake as was made by plaintiffs' counsel here cannot justify relief from judgment. In *Nemaizer v Baker*, 793 F2d 58, 61 (CA 2, 1986), cited with approval in *McCurry v Adventist Health System*, 298 F3d 586 (CA 6, 2002), the Court of Appeals reversed as an abuse of discretion a district court's decision to grant relief under FR Civ P 60(b) in order to avoid the unintended res judicata effect of a voluntary dismissal with prejudice. The Court declared that "an attorney's failure to evaluate carefully the legal consequences of a chosen course of action provides no basis for relief from judgment." *Nemaizer*, 793 F2d at 62.

Plaintiffs' reliance on and quotation of the Restatement (2d) of Judgments §71, (Brief, pp 26-27), is inexplicable. The principles stated therein would not permit, let alone mandate, relief here. The mistake did not consist of a "failure to express the judgment of the court," nor would it obviate an appeal and certain reversal. Id.

Contrary to plaintiffs' claim, and as found by the trial court, there was no misrepresentation, or unethical trickery, or fraud by silence by defense counsel that would rise to the level of fraud requiring the judgment to be set aside. Such factual findings are entitled to significant deference and should only be disturbed where there is clear error. *People v McSwain*, 259 Mich App 654; 676 NW2d 236 (2003).

Plaintiffs' claim that the trial court's response to plaintiffs' counsel's unilateral statement of intent regarding his agreement with Dr. Douglass, that the court and "they" "understood"

plaintiff's counsel's statement of his position, gave rise to a duty by the Hospital's counsel to disagree, is without merit. First, an "understanding" of an opponent's position in litigation does not mean agreement by counsel or the court with that statement of intent or position. As the trial court initially noted in response to this argument by plaintiffs' counsel: "I think it may have been incumbent that he [plaintiffs' counsel] get the affirmation of the parties that would be held bound by that interpretation with prejudice would not have the normal meaning attached to it by the law." (Apx p 88a, Tr II, p 33).

Moreover, in the context in which it was made, the statement by the trial court during placement on the record in chambers of settlement discussions was directed to Dr. Douglass and his counsel, with whom plaintiffs' agreement was made in the first instance, and not counsel for the Hospital. The Hospital had no role in that agreement, or in the discussion by the court with counsel for the parties to that agreement, plaintiffs and Dr. Douglass. There was, and still is, no reason to believe the court's comment was directed to counsel for the hospital. There was here no inquiry by plaintiffs' counsel or the trial court of counsel for the Hospital regarding whether he concurred in plaintiffs' counsel's declaration of his understanding or desire regarding the effect of his agreement with counsel for Dr. Douglass. As the trial court stated:

> THE COURT: Again, your agreement was with whom?
>
> MR. KENNEY: My agreement [was] with Doctor Douglass. * * *
>
> THE COURT: That's the critical point. You can have an agreement with them, but their not in a position to speak for the hospital.. [Apx, p 85a, Tr II, pp 29-30].

Moreover, regardless of what unilateral statements of intent were made, they were not included in the subsequently drafted and executed stipulation or in the order, both of which indicated plainly and without reservation that the dismissal was with prejudice.

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While plaintiffs argued to the trial court below that this comment of the court and silence by counsel when placing settlement discussions on the record warranted setting aside the order, the trial court rejected this argument. The trial court in ruling on the motion to set aside the judgment found nothing improper or misleading in the failure of counsel for the hospital to inject himself in a discussion of which he was not part. That discretionary, factual determination by the trial court should not have been disturbed by the Court of Appeals.

The decisions from other jurisdictions cited by plaintiffs, *Virzi v Grand Trunk Warehouse*, 571 F Supp 507 (ED Mich 1983), *Spaulding v Zimmerman*, 116 NW2d 704, 709 (Minn 1962), and *Hamilton v Nationwide Ins Co*, 404 SE2d 540 (W Va 1991), are completely inapposite. All three deal with a failure by one of the parties to the settlement agreement (not a third party as was the hospital here) to advise the other party to the agreement and the trial court of a critical change in facts unknown to the court or counsel, that materially affected the case and the basis for the settlement. (This was the death of the plaintiff in *Virzi*, the more severe medical condition in *Spaulding*, and the outcome of an insurance coverage summary judgment motion in *Hamilton*, the uncertainty of which was the incentive to settle.) None dealt with a failure of counsel for a third party to advise opposing legal counsel he was mistaken about the law.

Similarly without merit is plaintiffs' claim for support in *Matley v Matley (On Remand)*, 242 Mich App 100, 101-102; 617 NW2d 718 (2000), as "implying" that it is a fraud on the court to conceal material facts from the court and opposing counsel. No "fact" was "concealed" from court or counsel by counsel for the Hospital. The trial court expressly determined that a mistake of law, not of fact, occurred here:

> THE COURT: That's a mistake of law. There's no question that a mistake of fact would be if you had intended to have a dismissal without prejudice and the record shows repeatedly that you wanted to have that to be an order that provided for a dismissal without prejudice, and now all of a sudden now we find ourselves with an order that has

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inadvertently indicated a dismissal with prejudice. That would be clearly a mistake of fact.

What we're talking about here is a miscalculation of the effect of the terminology that was utilized in that agreement. And it was clear from all of our discussions that it was to be a dismissal with prejudice. [Apx 86a]. * * *

THE COURT: Any mistake made is a mistake of law not of fact. [Apx 91a].

Similarly, the duty of candor in MRPC 3.3(a)(2) is a duty only with regard to a material fact; here there was not an unknown fact, but a misstatement of the law--the legal effect of a stipulated order. The duty of candor to the Tribunal has no application and gives rise to no duty of opposing counsel to correct his brother or sister regarding their misstatement of the law. It only gives rise to a duty to advise the tribunal of opposing "controlling" legal authority where such had not been disclosed by the opposition and is "known" to opposing counsel. No such controlling precedent exists here. When counsel for plaintiffs made his statements all were in chambers responding to the Judge's questions on offers of settlement. The order of dismissal with prejudice was not even in existence. As Judge Murray noted in his dissent: " Similarly, '[a]n attorney's duty is to zealously represent the interests of his own client, and not to advise his adversary on the law.'" (Court of Appeals opinion, Apx 23a.)

Plaintiffs' reliance on the "any other reason" ground of MCR 2.612(C)(1)(f), and *Heugel v Heugel*, 237 Mich App 471, 478; 603 NW2d 121 (1999), is without merit. In *Huegel*, the Court identified the factors that must be established for application of this rule:

> (1) the reason for setting aside the judgment must not fall under subsections a through e, (2) the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside, and (3) extraordinary circumstances must exist that mandate setting aside the judgment in order to achieve justice. [citations omitted]. Generally, relief is granted under subsection f only when the judgment was obtained by the improper conduct of the party in whose favor it was rendered. [citations omitted.]

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In *Huegel*, the Court affirmed the trial court's exercise of discretion in granting relief in reliance on *Kaleal v Kaleal*, 73 Mich App 181; 250 NW2d 799 (1977). In *Kaleal*, the Court also affirmed the trial court, and emphasized that application of this subrule turned on trial court experience and discretion: "The trial courts must be empowered to draw from their long experience, both with the particular case and from the bench, to determine whether any variables in the case warrant this extraordinary relief." The Courts in both *Kaleal* and *Huegel* also found critical the absence of the advice of counsel (in *Huegel* because plaintiff induced defendant to ignore counsel's advice). Here it was legal counsel's own mistake of law and, as determined by the trial court, there was no misconduct of defendants or defense counsel.

Further, the substantial rights of Dr. Douglass clearly would be harmed if the dismissal with prejudice were set aside. The entry of a dismissal of a named defendant with prejudice and without payment of money is the only way the named defendant can escape direct or indirect liability from a civil action. Any other dismissal can result in a licensing investigation, exclusion from approved provider panels for health insurance companies, a later action for contribution or indemnity, or the refilling of a new action if the statute of limitations has not passed. The judgments of the trial court should be reinstated.

Respectfully submitted,

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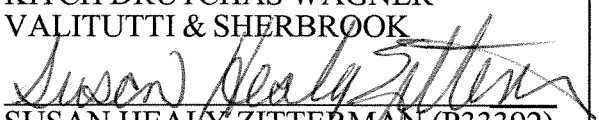
BY: 

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